United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed

75-6095

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

B

P/S

v.

LOUIS D. DeBERADINIS, JR.,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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CITATIONS

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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court committed reversible error in denying the taxpayer's motion for summary judgment.

2. Whether taxpayer has met his burden of proving that the assessed amount of $34,055.59 represents the amount of taxes collected for the entire second quarter of 1959, rather than for the period ending on May 21, 1959.

3. Whether the taxpayer may escape his liability under Section 6672 of the Internal Revenue Code of 1954, on the ground that the Internal Revenue Service, if it

had been more aggressive in pursuing that avenue, might have collected the amounts in question by seizing the operating assets of the corporation, McFaddin Express, Inc.

4. Whether the taxpayer has met his burden of proving that he was not a responsible officer of McFaddin Express, Inc., between April 1, 1959, and May 21, 1959.

5. Whether the taxpayer may escape his Section 6672 liability because the Internal Revenue Service did not apply the $72,640 recovered from Adley Corporation against the liability of McFaddin Express, Inc., for withholding taxes for the second quarter of 1959.

6. Whether the taxpayer has shown that the exclusion of certain items offered in evidence by him constituted reversible error.

STATEMENT OF THE CASE

The Commissioner assessed the taxpayer with a 100 percent penalty in the amount of $34,055.59 under the provisions of Section 6672 of the 1954 Code, in connection with the unpaid withholding taxes of McFaddin Express, Inc. (hereinafter McFaddin) for the portion of the second quarter of 1959 ending on May 21, 1959. The opinion, findings of fact and conclusions of law of the District Court (Judge Richard H. Levet) (R. 6a-26a)[1/] are not officially reported but are set out at 75-2 U.S.T.C., par. 9530. The opinion of the District Court (Judge T. Emmett Clarie), Appendix B, infra, denying the taxpayer's motion for summary judgment is not officially reported. The judgment of the District Court (R. 26a-27a) was entered on July 31, 1975. Taxpayer filed a timely notice of appeal on August 11, 1975 (R. 5a). Jurisdiction is conferred on this Court by 28 U.S.C. Section 1291.

The material facts, as found by the District Court, are as follows:

McFaddin was organized by taxpayer in 1953 for the purpose of engaging in the interstate freight carriage business. The taxpayer was the owner of substantially all of the stock of McFaddin and, until at least May 21, 1959, was president of McFaddin and the owner of substantially all of its stock. One share of stock was owned by Ray Boddy, who was the treasurer. (R. 8a.)

In January, 1959, gross revenues were received by McFaddin at the rate of about $60,000 per week. However,

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1/ "R." references are to the separately bound record appendix.

during 1959, McFaddin experienced financial difficulties which led the taxpayer to negotiate for the sale of its stock to Adley Corporation (hereinafter Adley), a competitor company. (R. 9a.) Pursuant to these negotiations, two written contracts were entered into on April 20, 1959. One was a management contract (R. 44a-52a) and the other was a sales contract (R. 39a-43a). The sales contract provided, inter alia, for the sale by taxpayer to Adley of the McFaddin stock, conditioned on the approval of the Interstate Commerce Commission (ICC) of both the sale and of the temporary management of McFaddin by Adley, as provided in the management contract. The latter provided that management and control of McFaddin would pass to adley "from the effective date of any order of the [Interstate Commerce] Commission authorizing the same * * * ." (R. 9a.)

As of May 21, 1959, an ICC order was issued, authorizing Adley to take over control of McFaddin on that date and, pursuant thereto, management and control of McFaddin passed from taxpayer to Adley on May 25, 1959. (R. 10a.)

From at least the fourth quarter of 1957 (Pltf. Ans. to Interrogatory 1, Appendix B, infra), McFaddin had at times failed to pay withholding taxes over to the Government when due. Taxpayer was a responsible officer of McFaddin through May 21, 1959. (R. 11a, 25a.) An assessment in the amount of $34,055.59, representing unpaid withholding taxes for the period April 1, 1959, through May 21, 1959, was made against taxpayer, as responsible officer, under the provisions of Section 6672 of the 1954 Code. (R. 11a, 12a.)

Taxpayer contested the assessed liability on the dual grounds that he was not a responsible officer of McFaddin during the second quarter of 1959 and that, in any event, he was not willful in failing to pay over the withholding taxes for the portion of that quarter ending May 21, 1959. The District Court found that taxpayer was a responsible officer for the period in question (R. 18a-19a), that he was willful within the meaning of Section 6672 (R. 19a-20a) and that he was liable for the taxes, as assessed (R. 26a).

SUMMARY OF ARGUMENT

I

The District Court correctly denied taxpayer's motion for summary judgment since, by and large, the mass of facts alleged in the several affidavits submitted by taxpayer and the recitations in the documents offered in support of the motion fail, as a matter of law, even if taken to be true, to establish the legal position upon which taxpayer's defense rested. The nearest thing to a directly relevant fact contained therein are the self-serving statements of taxpayer himself, in his affidavit, to the effect that Adley had supplanted him in management and control of McFaddin by April 1, 1959. But this is undercut by the fact that its force depends upon the credibility to be given to these statements of the party in interest--a situation which this and other courts have held inappropriate for a grant of summary judgment.

Moreover, this Court has held at least once that a denial of summary judgment is not reviewable. Whether or not that is still the rule in this Court, it is widely held that, unlike a grant of summary judgment, a denial thereof is a matter left to the broad discretion of the trial court. Taxpayer cites no case wherein an appellate court reversed a decision of the trial court to let the matter go to trial. The facts of this case present, at the least, a situation where such a decision was well warranted.

II

Taxpayer has the burden of proving any fact upon which he relies in attempting to show nonliability for the withholding taxes in question. The sole evidence offered by him in support of his contention that the court below erred in finding that $34,055.59 was the amount of withholding taxes collected by McFaddin as of May 21, 1959, is the fact that, in a number of documents, the Service represented that this was the amount assessed for the second quarter of 1959. But this constituted merely the general practice of identifying the taxable period for which the tax is assessed (with respect to withholding taxes, the taxable period is the quarter) and in no way can be read as an intended representation that the amount in question was the total amount withheld from employees during that quarter, or that it was the amount collected by any particular date therein.

III

The taxpayer's argument that he should be excused from the liability provided by Section 6672, even though he was a responsible officer who willfully failed to pay over taxes, because the Government might have been able to collect them by seizure of the operating assets of the corporation is one that has been rather consistently rejected by the courts, including this Court. The announced rule is that the liability of the responsible officer, once he is found to have been responsible and willful, is separate and distinct from that of the corporation and that the Government is not required to attempt to collect from the corporation as a prerequisite to asserting Section 6672 liability against the officer who was responsible for having allowed the deficiency to occur. Had the taxpayer performed his fiduciary duties properly--i.e., held the tax moneys safely in cash as a trust for the Government--it would not have been necessary for him to seek escape from the consequences by insisting that the Government pull his chestnuts out of the fire by seizing the operating assets of the business in the hands of the purchaser, thus probably putting the latter out of business.

IV

With respect to the question whether the trial court erred in finding that taxpayer was a responsible officer at least until May 21, 1959, the burden of proving the contrary was

upon taxpayer. As previously noted, the contracts of April 20, 1959, provide only that management and control were to shift when the ICC approved it (which, all parties agree, occurred on May 21). The fact that taxpayer's stock and resignation were in escrow does not in any way impair his administrative control over the corporation, or relieve him of his responsibility to protect the tax trust fund, until the resignation was made effective--which did not happen, at least until May 21.

Moreover, any factual inference to be found in the contractual provisions tending to support the contention that control shifted earlier is countered by taxpayer's statement in a letter written to the Internal Revenue Service to the effect that control shifted on May 25, 1959. The District Court was not clearly erroneous in concluding that taxpayer had not met his burden of proving an earlier shift in management and control.

V

Taxpayer's premises underlying his complaint about the application of the $72,640 recovered from Adley are wholly unfounded. First, there is no basis in the record for his contention that he incurred the costs of the litigation which resulted in recovery of that amount, nor is there any showing that he contributed any personal effort toward the litigation, or to what extent. But it is all irrelevant in any event since the record clearly shows that the amount in question was applied to satisfy the Government's claim for withholding taxes for

earlier periods which, if not thus satisfied, would have been a probable basis for Section 6672 liability of the taxpayer. Thus, had the Adley recovery been applied to satisfy the second quarter of 1959 withholding tax liability, the taxpayer would have become liable, pro tanto, for similar liability for the earlier period, thus left unsatisfied. The taxpayer has neither contended, nor attempted to prove, the contrary.

VI

The taxpayer's argument that the court below should have admitted certain items of evidence is without merit because, with respect to the first two, the fact which taxpayer suggests such evidence would have proved is not contested by the Government and, upon application of correct principles of law, is irrelevant. The exclusion of the third item was harmless (even if error) since the court made the finding in support of which taxpayer says the item was offered. The last item is subject to the points made above with respect to the first three.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT TAXPAYER WAS LIABLE UNDER THE PROVISIONS OF SECTION 6672 OF THE INTERNAL REVENUE CODE OF 1954 FOR THE WITHHOLDING TAXES IN THE AMOUNT OF $34,055.59, COLLECTED BY MCFADDIN EXPRESS, INC., FOR THE PERIOD APRIL 1, 1959, THROUGH MAY 21, 1959, BUT NOT PAID OVER TO THE GOVERNMENT

A. The District Court's denial of taxpayer's motion for summary judgment is not a basis for reversal

In his argument (Br. 7-14) that the District Court should have granted his motion for summary judgment, taxpayer relies on the assertion (Br. 7-8) that he presented in support of his motion substantial facts in affidavit form, with exhibits, but that the Government failed to file counter affidavits. What taxpayer fails to recognize is that mere volume of factual information and allegations in support of summary judgment does not entitle the movant to prevail. To the extent that the attested facts do not, as a matter of law, and even if taken to be true, establish the necessary elements required to support judgment for the movant's litigating position, they cannot support summary judgment any more than they could support judgment after trial and it is unnecessary for the party opposing summary judgment to challenge them. Brunswick Corp. v. Vineberg, 370 F. 2d 605, 611-612 (C.A. 5, 1967).

In his argument for summary judgment, taxpayer makes no effort to enumerate the facts necessary to establish nonliability under Section 6672 of the Internal Revenue Code of 1954, Appendix A, infra, or to show where each of those requisite facts are set forth in his affidavits, etc. He contents himself (Br. 12-13) with a "random sampling" of the facts

allegedly to be found in his presentation but with no analysis of the significance to be given those facts with respect to the ultimate issue at bar. Such items as the extent of the assets of McFaddin, computations of anticipated profit, the condition of the McFaddin equipment, etc., have no direct or controlling impact on the question as to whether taxpayer was a responsible officer of McFaddin during the period here in issue or whether he willfully failed to discharge his fiduciary duties in that capacity. The only one of the listed items which might have any direct or discernible connection with the issues here is the obscure reference (Br. 12) to the question of control (by which, we assume, taxpayer means control of the corporation). The evidence cited in connection with this (R. 44a-52a) is a copy of the management contract of April 20, 1959, between McFaddin and Adley. Taxpayer offers no enlightenment in this part of his brief as to the factual substance or legal significance to be found in this instrument but we will assume he has in mind the provisions cited by him in subsequent portions of his brief (pp. 26-27) wherein he contends that the evidence at trial required a finding that he was not a responsible officer of McFaddin after April 1, 1959. In our treatment of this contention later in this brief, we will show that these provisions are nonprobative of taxpayer's conclusion. Suffice it to say here that the only provision of that contract which purports to specify the time for assumption of management control by Adley (R. 9a)

recites that it is to occur as of the effective date of any order of the ICC authorizing that takeover. Since that event occurred on May 21, 1959, the documentary evidence presented by taxpayer in support of his motion supported the Commissioner's position rather than taxpayer's and scarcely required summary judgment in favor of the latter.

Although taxpayer does not purport to rely upon them in his summary judgment argument, it may be appropriate here to comment on the effect to be given certain statements in the taxpayer's affidavit, filed by him in support of his motion for summary judgment. It is attested therein that he was excluded from management control of McFaddin, and supplanted therein by Adley, as of April 1; that Adley thereafter made all decisions as to expenditures, etc. However, as noted by the District Court in denying taxpayer's motion (Doc. No. 21, Appendix B, infra), some of those statements are at best conclusory. But, in any event, it has been held by this Court, and others, that, where the evidence relied upon in support of a motion for summary judgment consists of statements by an interested party and the issue turns on the credibility of those assertions of fact, summary judgment is inappropriate. In Cross v. United States, 336 F. 2d 431, 433 (1964), where the Government had, in a tax case, failed to respond to affidavits filed on behalf of the taxpayer, this Court ruled that the District Court had erred in granting summary judgment to

taxpayer because his position rested on the credibility of his witnesses. In Colby v. Klune, 178 F. 2d 872 (1949), the Court observed that, where credibility is the issue, "trial by affidavit" is improper. The court went on to say (pp. 873-874) that--

> The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and--absent an unequivocal waiver of a trial on oral testimony--credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor.

See also, Arnstein v. Porter, 154 F. 2d 464 (C.A. 2, 1946). In Cales v. Chesapeake and Ohio Railway Co., 46 F.R.D. 36, 40 (W.D. Va., 1969), the court noted that the movant's case for summary judgment rested on several affidavits, all but one of which were by employees of the movant, and concluded that, where credibility "is, or may be crucial," summary judgment becomes improper. Indeed, in the Advisory Committee Note to the 1963 amendments to Rule 56, it was said (31 F.R.D. 623, 648) that: "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."

By and large, reversal in the appellate courts has been only with respect to the grant of summary judgment, not its

denial. Thus, it was said in National Screen Service Corp. v. Poster Exchange, Inc., 305 F. 2d 647, 651 (C.A. 5, 1962) that--

> Even in cases where the movant has technically discharged his burden, the trial court in the exercise of a sound discretion may decline to grant summary judgment. * * * It is likewise held that discretion plays no real role in the grant of a summary judgment; it being held that the granting of such judgment must be proper or such action is subject to reversal. [Emphasis in original.]

See also 6 Moore's Federal Practice (2d ed.), pars. 56.15(6) and 56.23; Anthony Grace & Sons, Inc. v. United States, 345 F. 2d 808 (Ct. Cl., 1965).

This Court dealt with the subject in Doehler Metal Furniture Co. v. United States, 149 F. 2d 130, 135 (1945), saying:

> We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. [Emphasis added.]

While the Court in Savarin Corp. v. National Bank of Pakistan, 447 F. 2d 727 (1971), did not expressly decline to entertain the appellant's contention that the trial court had erred in refusing to grant summary judgment, the entire concern of the court was with the alternative contention that the judgment entered for the appellee after trial was erroneous. Its cryptic comment at the very end of the opinion that the denial of summary judgment was affirmed is scarcely a comprehensive treatment of the question of the reviewability of such denials. Certainly, the court did not mention, or purport

to overrule, the position announced in Doehler Metal Furniture Co., supra. Thus, while it may not be entirely clear whether denials of motions for summary judgment are reviewable at all in this Court, it is beyond question that the trial courts are at least intended to have extreme latitude in determining that it would be better to allow the matter to go to trial. And, for the reasons set out above, the denial of summary judgment in the instant case is far from such an extreme abuse of discretion as to warrant reversal, particularly in view of the governing rule that the question of whether there is a material and genuine issue of fact should be viewed most favorably to the party opposing the grant of summary judgment. Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

B. The evidence does not support taxpayer's contention that the amount of $34,055.59 assessed against him represents the corporate liability for withholding taxes for the entire second quarter of 1959

The District Court found that the amount of $34,055.59 represented the withholding taxes collected during the period April 1, 1959, through May 21, 1959, and that, since this is the period during which taxpayer was the responsible officer of McFaddin, taxpayer was liable for this portion of the unpaid second quarter taxes. Taxpayer now contends (Br. 14-18) that this amount represents the unpaid taxes for the entire second quarter and that the judgment below is therefore

excessive. As the court below correctly noted (R. 17a), the taxpayer had the burden of proving any fact upon which it relied in seeking to prove that the assessment was excessive or otherwise erroneous. Taxpayer does not here contest that rule of law but argues that the record evidence uniformly established that $34,055.59 was the amount of taxes collected for the entire second quarter and not merely that collected up until May 21. In support of this contention, taxpayer cites (Br. 16-17) the Government's answers to interrogatories; the recitation of paragraph 7 of the complaint herein and certain other documents, each of which, in one form or another, contains the statement that the liability here in issue is that assessed for the second quarter of 1959. In fact, the recitations in question refer to the second quarter of 1959 only for the purpose of identifying the taxable period (quarter) for which the deficiency is being assessed. Nothing therein purports to establish what portion of the total amount of taxes collected during that quarter is represented by the amount of assessed liability--here, $34,055.59.

The above can be demonstrated with respect to the more familiar area of income taxes. If, for example, a calendar year taxpayer had omitted from income an amount received during a week of June, 1950, the deficiency notice would recite that the amount was being assessed for the taxpayer's taxable year 1950--not for a given week in June of that year--since the reporting period for income taxes is the full year. By

the same token, withholding tax deficiencies are always represented as deficiencies for the applicable reporting period (i.e., a taxable quarter) and not for the particular part of that quarter in which the deficiency accrued. The record references relied upon by the instant taxpayer, therefore, are not intended to establish the part of the taxable reporting period here in question--the second quarter of 1959--to which the assessed deficiency related but only that it is with reference to that taxable quarter. Hence, there is no merit in taxpayer's contention that these references constitute evidence that the $34,055.59 assessed against him represents the entire amount of taxes withheld during that quarter and, since taxpayer points to no other record evidence in support of his contention, he has failed to meet his burden of showing error in the assessment and the court below was on sound ground in entering judgment in that amount.

C. The taxpayer cannot avoid Section 6672 liability on the ground that the Internal Revenue Service might have been able to collect the taxes by enforcing its liens against the corporate property

The taxpayer argues (Br. 19-23) that the Service had liens against the McFaddin property out of which the delinquent taxes could have been collected and that its failure to do so should deprive it of its right under Section 6672 to collect from taxpayer, as responsible officer. This argument has been made many times previously by responsible officers and has been uniformly and invariably rejected by the courts. This Court,

in Spivak v. United States, 370 F. 2d 612 (1967), held (p. 616) that Congress, being interested solely in protection of the revenue, "intended that the trust funds be fully collectible from those responsible persons who caused the diversion as well as from the corporation * * * without any duty to protect the delinquent [emphasis added]." It thereupon concluded that the responsible officers were not released from their Section 6672 liability for the uncollected portion of the Government's tax claim by virtue of the fact that the Government had compromised its proven claim in bankruptcy against the assets of the insolvent corporation, even though the trustee in bankruptcy had had sufficient funds to pay the Government's tax claim in full.

In Cash v. Campbell, 346 F. 2d 670, 673 (1965), the Fifth Circuit held, with respect to the claim that the Government could have collected the taxes out of the bankrupt estate of the corporation, that, even though the Government was advised of the fund and had apparent priority rights to it, "The Government was not required to look to the * * * fund for the payment of its taxes." In Datlof v. United States, 370 F. 2d 655 (1966), cert. denied, 387 U.S. 906 (1967), the Third Circuit indicated that the Government was not required

to attempt to collect from the company. In Bernardi v. United States, 74-1 U.S.T.C., par. 9170 (N.D. Ill., Dec. 5, 1973), aff'd per curiam, 507 F. 2d 682 (C.A. 7, 1974), with the Seventh Circuit adopting the findings and conclusions of the District Court, it was held that "It is unnecessary for the Internal Revenue Service even to attempt collection from the corporate employer, before asserting the personal liability of the responsible person." 74-1 U.S.T.C., p. 83,216. From all this it is quite apparent that there is no merit in taxpayer's contention that the Government was required to exercise diligence in attempting to collect the defaulted taxes from the corporation as a prerequisite to invocation against him, as responsible officer, of the provisions of Section 6672.

Taxpayer's reliance upon Dudley v. United States, 428 F. 2d 1196 (C.A. 9, 1970), is misplaced. Nothing therein purports to be a holding in conflict with the solid line of authority cited above. The question here raised by taxpayer is whether a responsible officer who has been shown to have willfully violated his fiduciary duties during his tenure as responsible officer should be relieved of his liability if the Service fails to exert sufficient efforts to collect from the defaulting corporation, after taxpayer had severed his connection therewith. In Dudley, the question was whether the taxpayer had, during his tenure, willfully failed to pay over the taxes when he had in good faith mailed a check to the Service which was dishonored by the

bank for insufficient funds after the Service had held it for an inordinate period of time before presenting it for collection. The taxpayer in Dudley was held not to have been willful because the procrastination in presenting the check, together with the Service's then failure timely to notify the taxpayer of the dishonor, had deprived the taxpayer of the opportunity to use other funds of the corporation to pay the taxes during his remaining period of control of the corporation and that, by the time he was belatedly notified, he had been supplanted as responsible officer.

In relying upon Tozier v. United States, 65-2 U.S.T.C., par. 9621 (W.D. Wash., April 13, 1965), taxpayer selectively quotes (Br. 22-23) a single paragraph from the findings of fact in that case. He ignores entirely the correct distinguishment made by the court below (R. 23a-24a). There the taxpayer, upon learning of the tax deficiencies, had planned to liquidate the corporation at a time when this would have produced ample cash to pay the tax debt, and had intended to use it for that purpose. However, he had been dissuaded from doing so by the revenue agent who agreed that, if the taxpayer was willing tc continue the operation of the business, any cash produced by a later liquidation, if that proved necessary, would be used to satisfy, first, any tax obligations of the corporation nonpayment of which might result in Section 6672 liability for taxpayer. (65-2 U.S.T.C., p. 96,645, pars. XXIV and XXV. The holding of the court was based upon these facts, together

with the fact that, when subsequent liquidation took place, the Service breached its agreement in reliance upon which the taxpayer had risked continued corporate operation and first applied the amounts realized through seizure of the corporate property to the corporation's liability for other types of taxes, thus leaving unpaid some portions of the liability for withholding taxes and asserting a Section 6672 claim against taxpayer for such amounts. Although the Tozier court was not overly specific in stating the factual reasons underlying its holding of nonwillfulness, there is no indication at all that the mere lack of aggressiveness by the Service in asserting its prior lien rights was, absent the fact that the taxpayer was misled into changing his position, to his detriment, deemed sufficient to produce the result there. Moreover, to the extent that Tozier can be read as a holding that the fact alone, of the lack of aggressiveness by the Service in asserting its lien rights will protect a taxpayer from Section 6672 liability, we respectfully submit that it would be an erroneous application of law, wholly out of step with the line of authority set out above.

Moreover, apart from the fact that the precedents are adverse to taxpayer's position, we point out that his current situation is, in part, at least, the result of his own failure to perform his fiduciary duties properly during his tenure as responsible officer. We note that it has been found that taxpayer organized McFaddin in 1953 (R. 8a) and was in complete

control until May 21, 1959 (R. 25a). During that period, and under taxpayer's stewardship, there were frequent failures to pay over withholding taxes when due. (Deft. Br. 5, 20; R. 62a.) Patently, then, taxpayer did not hesitate, when the corporate financial situation tempted him, to use the tax trust fund to pay other corporate creditors. It seems clear that, as of May 21, 1959, the taxes withheld between April 1 and that date were not being held in a cash trust fund awaiting payment to the Government as they should have been, but had been invested in the corporate enterprise. It is only for this reason that the situation existed which motivated taxpayer to urge the Service to attempt collection by seizure of the operating assets of McFaddin. Had the cash been held safely in trust for the Government, there would have been no need to suggest that the Government pursue extraordinary collection remedies against the assets of the corporation. As noted, a responsible officer may not willfully fail to discharge his fiduciary duties and then escape his liability under Section 6672 by handing the Government a lawsuit as a means of recovering the defaulted taxes. There is no legal or equitable basis for allowing taxpayer to escape his liability because the Government, for whatever reason, failed to pull taxpayer's chestnuts out of the fire.[2/]

2/ The court below, having dismissed taxpayer's argument as a matter of law, made no findings with respect to the factual basis of that argument. Thus, it has not been found that the Government could have collected from McFaddin and deliberately failed to do so.

D. The District Court was not clearly erroneous in finding that taxpayer had not met his burden of proving that he was not a responsible officer of McFaddin between April 1 and May 21, 1959

As the court below correctly found (R. 17a)--without challenge by taxpayer--the taxpayer bore the burden of proving that he was without the power to control the handling of tax funds between April 1 and May 21, 1959. The court concluded on the whole record that taxpayer had not met that burden and found, accordingly, that he turned over management and control to Adley only on or after May 21, 1959. (R. 10a, 19a.)

In challenging this finding, taxpayer relies primarily (Br. 24-25) upon certain documentary evidence and certain conjectural conclusions which he insists must be drawn from them. Specifically, he points to the sales and management contracts and to the provisions therein for assumption of management control by Adley. But there is no provision clearly calling for turnover of control by or before April 1, 1959, nor, for that matter, by April 20, 1959. To the contrary, it is expressly provided (R. 9a) that management and control would pass "from the effective date of any order of the [Interstate Commerce] Commission authorizing the same * * * ."

Taxpayer additionally relies (Br. 24-26) on circumstances having to do with the financial condition of McFaddin and certain alleged risks incurred by Adley, from which he asks the court to conclude that it was essential to Adley's interests

that it assume control of McFaddin (presumably--although taxpayer sets forth no direct chronological tie-in--by April 1, 1959). This is pure unsupported and argumentative conjecture, of course, without a shred of evidence to back it up.

Taxpayer also calls the Court's attention (Br. 26-27) to the contract provision under which he and his brother were required to put all their McFaddin stock in escrow and all officers and directors of the corporation (including taxpayer) were required to place their executed but undated resignations in the same escrow, subject to being accepted upon written demand of Adley. Taxpayer fails to recognize, apparently, the difference between being subject to removal from control and having been actually removed. The fact is that Adley's rights under this provision were never exercised--at least until after May 21, 1959. Therefore, the resignations were not effective and taxpayer continued in whatever position of official authority he had occupied prior thereto. It may be that, because of this situation, Adley's wishes would have considerable weight with taxpayer but it does not alter the fact that, until he was actually removed from authority, the taxpayer had the power to control the handling of withholding taxes and, with it, the responsibility under Section 6672. The possibility of being removed by Adley if taxpayer exercised his authority in a manner unsatisfactory to Adley would not justify him in misusing those funds nor would it relieve him of his fiduciary responsibility until,

and unless, he was actually removed. [3/] It has been frequently held by the courts that such extraneous concerns as that the corporate business would go under if the responsible officer properly observed his trust fund responsibilities does not excuse failure to observe them. Monday v. United States, 421 F. 2d 1210, 1216 (C.A. 7, 1970); Harrington v. United States, 504 F. 2d 1306, 1316 (C.A. 1, 1974). This Court held in Kalb v. United States, 505 F. 2d 506, 510 (1974), that the existence of contractual rights in third parties to dictate use of corporate funds did not relieve the responsible officer of his position of responsibility where he had agreed to the creation of those contractual rights. Similarly, here, taxpayer was obligated to exercise his power to ensure proper handling of tax funds (refusing, if necessary, to obey any contrary demands of Adley) until he was officially removed from his position of corporate authority. [4/] Upon such removal, his authority and accompanying responsibility would terminate--but not until then.

3/ It may be noted that many, or most, responsible officers are subject to removal by the board of directors but, until removed, they are required to discharge properly their fiduciary responsibilities.

4/ We suggest that it was doubtful that compulsive measures would have been taken by Adley in face of the fact that (as taxpayer himself points out (Br. 24-25)), it was legally disqualified from seeking to control McFaddin until ICC approval had been given.

It is clear then that the contractual provisions in question do not support taxpayer's position but, rather, support the finding of the District Court that management control did not pass to Adley till May 21, 1959. The taxpayer complains (Br. 30) that his testimony which was cited by the District Court in support of its finding does not in fact support it but is to the contrary. We first point out that it is not necessary, in order for this Court to affirm the finding in question, that there be evidence to support it. As shown, supra, the burden of proving the fact upon which it relies--that the shift of control took place before May 21, 1959--is upon taxpayer and that the absence of probative, credible evidence either way requires judgment for the Government.[5/] We have demonstrated that the documentary evidence does not support taxpayer's position. Therefore, a mere showing by taxpayer that his testimony does not support the Government's position is of no avail to him.

To the extent that taxpayer's testimony, as quoted in his brief (pp. 31-34), might be held out (although taxpayer does not seem to do so) as having a tendency to show that, by April 1, 1959, he had surrendered administrative control and authority

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5/ Note that the District Court captioned its analysis of this question (R. 18a) " * * * [Taxpayer] Failed To Meet His Dual Burden."

over McFaddin and that Adley had assumed full sway over its financial affairs, it is to be noted that, as of this date, there was not even an executory contract in force, the first commitment of any nature having been signed on April 20, 1959 (R. 9a). To give such significance to that testimony, it would be necessary to believe that the taxpayer had turned over full control of his corporation and its funds and assets--lock, stock and barrel--to a competitor company without even a sales contract in effect and with no assurance that there would ever be one. Such an assertion would be so inherently incredible that no court would be compelled to give credence to it.[6/] It is important to note (as did the District Court (R. 18a)) that taxpayer--having the burden of proof--has offered no testimony (e.g., by Ray Boddy, the office manager-controller (Deft. Br. 33)) tending to confirm such an unbelievable and wholly self-serving assertion. Moreover, taxpayer's testimony is impeached by Plaintiff's Exhibit 6, Appendix, infra, a letter from taxpayer to the Internal Revenue Service, dated December 19, 1961, wherein he represented that Adley had taken control of McFaddin on May 25, 1959.

6/ The District Court noted (R. 18a) that any evidence presented by taxpayer in an effort to meet his burden would have to be credible in order to be given effect.

Finally, we point out that taxpayer's counsel, in questioning Michael D'Ambrosio, said (R. 55a) that "I call to your attention that there is evidence in this case that Adley took over the control of McFaddin on May 25, 1959." We submit that, on the basis of all of the above--together with the circumstances noted by the District Court (R. 18a-19a) in finding that taxpayer had failed to meet his burden--it cannot be said that the taxpayer so clearly met his burden of proof that the District Court was clearly erroneous in finding that the control of McFaddin did not shift from taxpayer to Adley before May 21, 1959,[7/] and that taxpayer was, thus, a responsible officer until that date.

E. There is no merit to taxpayer's complaint about the application of the $72,640 recovered from Adley

In arguing (Br. 35-36) that the $72,640 produced by the legal proceedings brought in the names of McFaddin and the taxpayer against Adley should be applied against his liability under Section 6672, the taxpayer rests his case on the erroneous premises that (1) the award was obtained at taxpayer's expense and through his work and (2) the application of the $72,640 did not relieve taxpayer of Section 6672 liability. Without conceding that the taxpayer would be entitled to the relief he

7/ So far as we are aware, there is absolutely no evidence tending to show that the taxpayer surrendered control to Adley on April 20, 1959. Therefore, taxpayer's contention that control shifted "at least by April 20, 1959" (Br. 25) is without merit.

seeks if the above were true, we submit that the premises are untrue.

First, we note that the taxpayer provides no citations to the record in support of the factual assumptions which he asks the Court to accept. In fact, the underlying facts as to any cost to taxpayer, or personal efforts by him, with respect to the subject litigation were not made part of the record.[8/] However, documents in the Government's file show that taxpayer's current counsel, Mr. Weiss, handled the litigation against Adley on the basis of a 40 percent contingency fee with the Government agreeing with Mr. Weiss in advance that it would, pro tanto, waive its lien against any amount recovered. Since the amounts paid by Adley in settlement of the claim belonged to McFaddin, this cost came out of corporate funds and not the taxpayer's pocket. Moreover, the record fails to show that taxpayer contributed any personal efforts to the litigative process.

Finally, the above is irrelevant in any event since the record does show that the $72,640 was applied in a manner which reduced, dollar for dollar, taxpayer's otherwise liability under Section 6672. The District Court found (R. 13a) that the amount in question was applied against the unpaid withholding tax liability of McFaddin for the fourth quarter of 1957 and the

8/ This, of course, must go against the taxpayer who bore the burden of proof.

first quarter of 1958. Since, had these liabilities not been thus satisfied, assessments against taxpayer under Section 6672 would surely have been made and pursued,[9/] it is apparent that application of the $72,640 against the instant liability for second quarter, 1959 taxes would not have reduced taxpayer's overall liability by a penny. Hence, it is clear that taxpayer's complaint is wholly without factual foundation.

F. There is no merit to taxpayer's contention that evidence was erroneously excluded

Taxpayer argues (Br. 36-37) that four items of proferred evidence were erroneously excluded.

(1) With respect to the complaint and opinion in the Connecticut litigation against Adley, taxpayer asserts that it would have shown that McFaddin was destroyed by Adley. Since the Government has never contested that fact in the instant litigation but stands on the position (see point C, supra) that, as a matter of law, it was not required to seek to collect the defaulted taxes from McFaddin or Adley, the evidence in question was irrelevant and could have changed nothing.

(2) The comments in paragraph 1, supra, apply also to the exclusion of Internal Revenue Service Publication No. 586.

9/ See the Government's response to interrogatory 6 of taxpayer's interrogatories (R. 29a) where it is indicated that the assessment against taxpayer for the fourth quarter of 1958 was abated because the amount had been paid in full.

(3) Since the District Court made the finding (R. 11a) which taxpayer says it sought through the offer of Exhibit G (inventory of McFaddin equipment), it seems fairly obvious that its exclusion could not have been prejudicial error.

(4) To the extent we can understand the thrust of taxpayer's complaint concerning exclusion of certain of his testimony, the response thereto is the same as that set out in paragraphs 1 and 3, supra.

CONCLUSION

For the above reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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PETER C. DORSEY,
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DECEMBER, 1975.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 19th day of December, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

Tobias Weiss, Esquire
123 Prospect Street
Stamford, Connecticut 06901

Gilbert E. Andrews/mk
GILBERT E. ANDREWS,
Attorney.

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	CIVIL NO. 13,664
	:	
LOUIS D. DE BERADINIS, JR.	:	

ANSWERS TO INTERROGATORIES

Plaintiff answers defendant's interrogatories as follows:

Q. 1. State the type of each and every tax liability, the period to which it relates, and the amount thereof, owed to the United States by McFaddin Express, Inc. (herein also called "McFaddin") for 1958 and later years.

A. 1. The tax liabilities assessed against McFaddin Express, Inc., for which judgment was entered in this Court (Civil Action No. 8527) in November 1961, were as follows:

Kind of Tax	Period		Amounts
Withholding and Social Security	4th Qtr. of 1957	Tax	$49,480.52
		Penalty	989.61
		Interest	197.92
Withholding and Social Security	1st Qtr. of 1958	Tax	46,253.95
		Penalty	508.78
		Interest	171.14
Withholding and Social Security	2nd Qtr. of 1959	Tax	55,351.50
		Interest	194.59
Unemployment	1959	Tax	5,605.29
		Interest	32.41
Unemployment	1959 (additional)	Tax	2,303.61
		Interest	425.89
Excise	4th Qtr. of 1957	Tax	15,292.80
		Penalty	305.84
		Interest	100.35
Excise	2nd Qtr. of 1960	Tax	3,000.00
		Penalty	750.00
		Interest	180.98

The amounts set forth above as interest represent only assessed interest and do not include accrued unassessed interest.

Q. 2. With respect to each tax liability referred to in question no. 1 above, state the amount of interest and penalty, if any, which became due from McFaddin.

A. 2. See answer 1 above.

Q. 3. With respect to the tax liabilities of McFaddin for 1958 and later years, and with respect to any interest and/or penalty owed by McFaddin for any of those years, set forth each individual amount obtained or collected by the United States for application against those liabilities, the source from which the United States obtained or collected that amount, and the date on which the United States obtained or collected that amount.

A. 3. In December 1962, the sum of $22,481.34 was collected from New Haven Board and Carton Company, Inc., representing money due McFaddin. In November 1964, the sum of $67,912.96 was received from sale of McFaddin's interest in Interstate Commerce Commission Certificate of Convenience and Necessity No. MC112718. In September 1973, the sum of $72,640.00 was received from settlement of the Government's claim in Civil Action No. B-557 in this Court, entitled The Adley Corporation v. McFaddin Express, Inc., United States, et al.

Q. 4. With respect to each amount collected by the United States, as referred to in question no. 3 above, describe each tax, interest, and/or penalty against which that amount was applied, including the period involved, and show the amount of tax, interest and/or penalty satisfied by each such application.

A. 4. The collection of $22,481.34 was applied as follows:

Kind of Tax	Period		Amounts
Excise	4th Qtr. of 1957	Tax	$15,292.30
		Penalty	305.84
		Interest	4,586.69
Withholding and Social Security	4th Qtr. of 1957	Tax	2,296.01

The collection of $67,912.96 was applied as follows:

Unemployment	1959	Tax	5,685.29
		Interest	1,639.25

Kind of Tax	Period		Amounts
Unemployment	1959 (additional)	Tax	2,303.61
		Interest	425.89
Excise	2nd Qtr. of 1960	Tax	3,000.00
		Penalty	750.00
		Interest	1,129.57
Withholding and Social Security	4th Qtr. of 1957	Tax	43,957.94
		Penalty	989.61
		Interest	8,031.80

The collection of $72,640.00 was applied as follows:

Withholding and Social Security	4th Qtr. of 1957	Interest	6,359.38
Withholding and Social Security	1st Qtr. of 1958	Tax	46,253.95
		Penalty	503.78
		Interest	19,517.89

Q. 5. With respect to each tax referred to in question no. 1 above, and with respect to each interest and penalty charge referred to in question no. 2 above, show the ones for which the United States has claimed defendant DeBeradinis was liable under the 100% penalty assessments against him.

A. 5. As set forth in paragraph 7 of the complaint, the trust fund portions of withholding and Social Security taxes for the first quarter of 1958 and the second quarter of 1959 were assessed, as one hundred percent penalties, against the defendant, in the amounts of $39,680.73 and $34,055.59, respectively.

Q. 6. As to each collection obtained by the United States for application against tax, interest and/or penalty of McFaddin, show how and the extent to which the United States applied each such collection against each penalty assessment asserted by the United States against defendant DeBeradinis; and set forth the tax, interest and/or penalty of McFaddin to which that penalty assessment relates.

A. 6. After application of the collections set forth above, McFaddin remains liable for the following: (1) The full amount of the assessment of withholding and Social Security tax, with interest, for the second quarter of 1959, in the amount of $55,546.09, plus

accrued unassessed interest. (2) Accrued unassessed interest on withholding and Social Security tax for the first quarter of 1958. All other accounts set forth in the answer to 1 above have been paid in full. Since the withholding and Social Security tax for the first quarter of 1958 have been paid, the defendant is no longer liable for the one hundred percent penalty for that tax. However, the defendant remains liable for the one hundred percent penalty for withholding and Social Security tax for the second quarter of 1959, in the amount of $34,055.59, plus accrued interest.

Q. 7. Set forth and describe each tax liability, interest and/or penalty charge of McFaddin, including the kind and amount thereof and the period to which it relates, which the United States claims to remain unpaid at the present time.

A. 7. See answer 6 above.

Q. 8. Set forth and describe each p[illegible], including the kind and amount of tax (or interest or penalty) and the period to which it relates, which the United States claims to be owing by defendant DeBeradinis at the present time.

A. 8. See answer to 6 above.

Q. 9. Set forth and describe each interest amount, describing the tax or penalty or other charge to which it relates, which the United States claims to be owing by defendant DeBeradinis at the present time.

A. 9. The defendant is liable for interest at the rate of six percent per annum on the sum of $34,055.59 from January 13, 1961, the date of assessment of the one hundred percent penalty.

Dated at Hartford, Connecticut, this 4th day of March, 1974.

UNITED STATES OF AMERICA

STUART M. JONES
United States Attorney

By

HENRY S. COHN
Assistant United States Attorney

Of Counsel: Robert L. Handros, Esq.
Department of Justice
Washington, D.C.

CERTIFICATION

This is to certify that a copy of the foregoing Answers to Interrogatories was mailed postpaid to Defendant's attorney, Tobias Weiss, Esquire, 123 Prospect Street, Stamford, Connecticut 06901, this 4th day of March, 1974.

/s/

HENRY S. COHN
Assistant United States Attorney

UNITED STATES OF AMERICA :

-vs- : Civil No. [illegible],

LOUIS DeBERARDINIS, JR. :

RULING ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

The defendant has moved for summary judgment under Rule 56, Fed. R. Civ. P., requesting that the Court find that the plaintiff is not entitled to recover against him for wilful failure to collect and pay over federal withholding and FICA taxes amounting to $73,736.32, as authorized under § 6672 of the Internal Revenue Code of 1954, 26 U.S.C. § 6672. The defendant was an officer of McFaddin Express, Inc. (McFaddin) during the period for which reimbursement is claimed by the Government. The defendant is accordingly charged with the statutory duty of collecting and paying the taxes for said corporation, which relate to the withholding taxes, social security and excise taxes as assessed.

The defendant filed several affidavits with accompanying exhibits and memoranda, claiming that at the time McFaddin transferred its assets to The Adley Corporation (Adley), McFaddin owned assets and equity greatly in excess of the amount of its United States tax obligations. He claims that even if secured creditors had priority over the

United States tax liens (which fact is not conceded), it would have been an easy matter for the Government to enforce the liens and collect the arrearage. The defendant claims that the record supports his position, that as a responsible officer of McFaddin, he did not wilfully fail to collect and pay over withholding and social security taxes owed by McFaddin, but rather that the Government deliberately failed to enforce its tax liens and that its failure was the result of its own wanton and reckless conduct.

The defendant stresses that Rule 56, Fed. R. Civ. P., requires that the plaintiff file counter-affidavits to meet the defendant's affidavit-supported claims and that the Government's failure to do so, should justify the Court granting summary judgment to the defendant. The plaintiff's affidavits, however, assert general conclusory allegations in several material areas, which require evidentiary support to assist the Court in making required findings.

It is settled law that summary judgment is not warranted even where all parties have filed cross-motions for summary judgment and both represent that there are no genuine issues of material fact. Walling v. Richmond Screw Anchor Co., 154 F.2d 780. 784 (2d Cir.,) cert. denied, 328 U.S. 870 (1946). "Good sense and sound theory, if these be distinguishable, combine to produce the rule. Good sense, because neither a single motion nor multiple motions can dissipate factual issues." 6 J. Moore, Federal

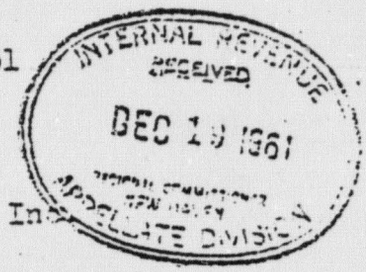
Practice ¶ 56.13, at 2248 (1971 ed.). See also American Mfg. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 278-280 (2d Cir. 1967); Union Insurance Society v. Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965). "Sound theory . . . because a party entitled to summary judgment must bear the burden of establishing the indisputability of the facts which warrant judgment in his favor." 6 J. Moore, Federal Practice, supra. The defendant has in the general conclusory allegations contained in his affidavit failed to sustain his burden.

The Court, having reviewed the defendant's affidavits, exhibits, and memoranda, together with all the papers, finds that genuine issues of material fact remain to be decided and that summary judgment is, therefore, inappropriate. The defendant's motion for summary judgment is accordingly denied and the case is assigned for trial at Bridgeport as the first case on the court calendar. SO ORDERED.

Dated at Hartford, Connecticut, this 6th day of January, 1975.

T. Emmet Clarie
Chief Judge

Louis DeBeradinis, Jr.
8 Westcq Road
Stamford, Conn.
December 19, 1961



Internal Revenue Service
Appellate Division
New Haven, Connecticut

Re: McFaddin Express, In[illegible]

April 20, 1959: Entered into agreement with Adley Express Company to sell Corporate Stock of McFaddin.

Adley Express entered into agreement to control McFaddin pending final approval of sale by Interstate Commerce Commission

May 1, 1959: Made application to I.C. C. for approval of Temporary Authority

May 20, 1959: I. C. C. granted Temporary Authority

May 25, 1959: Adley took complete control of McFaddin Express, Inc., its assets were

tangible assets and all other assets were approximately $1,000,000 of which $39,000. were intangible assets e.i. the operating authority which was purchased at an earlier date:

accounts receivable	$143,814.02
Salaable material and supplies	53,937.13
Earned Insurance credit	15,000.00 (approx.)
Office equipment	70,000.00
Material handling equip.	60,000.00
Shop equipment	13,000.00
	$355,751.15

The readily collectible and saleable assets not subject to any mortgage were approximately $355,751.15 far exceeding any tax lien of the government. These assets, at the very worse would have more than satisfied the government tax claim. These assets were turned over to Adley in a fiduciary relationship. Adley obtained tangible assets on representation that 1) they recognized the tax obligation 2) they intended to maintain the monthly payments of $3500. to the government 3) from a represented net profit of $43,000. a month from a going business of McFaddin that Adley could and would pay the U. S. government,

and in fact undertook to do so until the August 1959 payment was due and then refused and failed wilfully and knowingly to pay the federal tax claim in spit of an agreement with the Internal Revenue which they assumed, and undertook to pay and the knowledge of tax liens.

If I read the liens correctly, up to May 25, 1959 approximately $51,000. had been liened and of this $51,000. about $17,500 was paid.

At the same time Adley had all of the McFaddin assets, was collecting McFaddin accounts receivable and selling their physical assets, they decided wilfully not to pay the federal tax claim and then Adley paid to themselves between $125,000. and $150,000 in cash. Adley took the shop equipment, office equipment, tires and tubes, material handling equipment, stock and supplies and salvageable merchandise known as O.S.& D.'s.

Shortly after Adley took over all of the assets and the operating business on May 25, 1959 according to contract I placed all of my stock in escrow to the benefit of Adley and they had the sole control and voting power of the stock, management control, trusteeship of assets and operating business.

I could not have wilfully refused or neglected to pay any federal tax claim because on the contrary I wilfully made arrangements for payments by my contract of April 20, 1959 and to show Adley's knowledge and representations and expressed intent I refer to Exhibit A of BMC 46. Recall that only $51,000. had been liened at that time.

In June and July 1959 Adley made representations to the Internal Revenue Service, Messrs. Kennedy and Beech that they would make the payments, only to reneg on their own promises in about August 1959. I was assured personally by Mr. M. L. Adley, president

of Adley Express, and trustee of the funds and assets that he would pay any federal tax claims. He confirmed this in the contracts of April 20, 1959 and the applications to the I.C.C. of May 1, 1959 as well as his agreements with Messrs. Kennedy and Beech of the Internal Revenue Service.

From May 25, 1959 to the present date the only persons who could disburse funds of McFaddin were Mr. M. L. Adley and Mr. D. J. Adley as will be reflected by the bank accounts at the Fairfield County Trust Company of Stamford, Conn., and/or any other banks containing McFaddin deposits.

Furthermore, Adley absorbed McFaddin's transportation business the proceeds of which were developing almost $3,000,000. a year gross revenue. It was from this revenue which they absorbed that they represented they would net $43,000. a month and be able to pay off any tax claim.

Note that this is above and beyond the assets that Adley took which in themselves could have paid the tax claim many times.

As of today, December 19,1961 I have not received the return of one asset or one dollar and Adley still continues to possess assets and use them to their entire benefit and the ability to dispose of them and keep the money.

To verify the asset figures I have furnished to you, I would suggest that any determination be deferred and your division delegate a proper agent to accompany me immediately to the Adley Express office to examine the books and records of McFaddin under Adley's fiduciary control, as in spite of frequent oral and written requests I have not been able to obtain the access to McFaddin books during reasonable business hours, which is a violation of Connecticut law. I believe if we went there today, now with my accountant, Mr. Hochberg,

he could be of great assistance since he is familiar with these books.

Of Course, I understand you have the power of subpeona and might desire to seize the books without notice.

Furnished by Louis DeBeradinis, Jr. to Internal Revenue Service, Appellate Division, on December 19, 1961, informal hearing.

Louis DeBeradinis, Jr.

EXHIBIT 6